No. 06-267

Supreme Court, U.S.
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# In The Supreme Court of the United States

GOVERNMENT OF TURKMENISTAN,

*Petitioner,*

v.

BRIDAS S.A.P.I.C., BRIDAS ENERGY INTERNATIONAL, LTD., INTERCONTINENTAL OIL & GAS VENTURES, LTD., AND BRIDAS CORP.,

*Respondents.*

**On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit**

## OPPOSITION TO PETITION FOR CERTIORARI

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## STATEMENT PURSUANT TO RULE 29.6

Respondents' parent companies are Ambas Holding Limited; Energy Developments and Investments Corp.; Energy Holdings International Ltd.; Associated Petroleum Investors Limited; Intercontinental Investments Holding Ltd; and Intercontinental Energy Investors Ltd. No publicly held company owns 10% of Respondents' stock.

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## OPPOSITION TO A PETITION FOR CERTIORARI

Respondents Bridas S.A.P.I.C., n.k.a. SPM Energy Investments LLC, Bridas Energy International, Ltd., Intercontinental Oil & Gas Ventures Ltd., and Bridas Corporation (collectively, "Bridas") respectfully oppose the petition filed by the Government of Turkmenistan ("Government") for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fifth Circuit in this case.

## OPINIONS BELOW

The opinion of the court of appeals is reported at 447 F.3d 411 (5th Cir. 2006). The opinion of the district court is unreported. A prior decision by the court of appeals is reported at 345 F.3d 347 (5th Cir. 2003).

## COUNTERSTATEMENT OF THE CASE

### A. Introduction

Petitioner the Government of Turkmenistan ("Government") urges this Court to grant review to resolve three issues: (1) whether the Fifth Circuit's decision below created a circuit split on the scope of the "injustice" exception contained in *First National City Bank v. Banco Para El Comercio Exterior de Cuba*, 462 U.S. 611 (1983) ("*Bancec*"); (2) whether the Fifth Circuit improperly made a factual finding regarding whether Bridas could collect its award against State Concern Turkmenneft ("Turkmenneft"); and (3) whether the discount rate applied by the arbitrators to determine the present value of Bridas'

future losses manifestly disregarded the law. The answer to all these questions is no.

First, *Bancec* set forth two exceptions to the recognition of the separate status of a government and its instrumentality – control or injustice. The Fifth Circuit concluded that both control and injustice were demonstrated in this case so the separate status of the Government and Turkmenneft should be ignored. This was more than *Bancec* required and therefore cannot create a conflict with the *Bancec* "injustice" exception. Although the Government portrays the "injustice" exception as a very narrow one requiring use of U.S. courts or a violation of international law, none of the cases it cites supports this reading of *Bancec*. Therefore, the Fifth Circuit's decision is also not in conflict with these cases.

The Government also complains at length that because other courts have not bound a nonsignatory government to an international arbitration award under the alter ego doctrine, this doctrine is not applicable to arbitration agreements. However, arbitration agreements are no different than any other contract, and federal courts have long applied the same doctrines to bind a nonsignatory to an arbitration agreement as they have to any other kind of contract. If anything, the Government's assertion that the alter ego doctrine has not been used previously to bind a nonsignatory government to an international arbitration agreement simply demonstrates that this is a rare case not warranting review.

The Government's "sky-is-falling" prognostications regarding the impact of this case on international economic development ring hollow for this very reason. Moreover, to the extent that this case could have an

impact, it would be failing to apply the rule of law (here the alter ego doctrine) that would undermine business confidence by unsettling parties' expectations. It is failing to apply the rule of law, not its application, that would undermine business confidence and retard international economic development.

Second, the Fifth Circuit's conclusion that the award against Turkmenneft was uncollectible was not error, because the district court did not resolve this issue. Therefore, the Fifth Circuit's resolution of the issue, even assuming it was a factual finding, could not be inconsistent with the district court's decision. Moreover, the Fifth Circuit had a complete documentary record before it when it rendered its decision. It was, therefore, within the Fifth Circuit's discretion to review that record and avoid remand by deciding what the district court had failed to decide. Once again, the Government fails to cite a single case that demonstrates a conflict on this issue.

Finally, this Court has already denied review of the manifest disregard issue once before in this case, and the Government provides no new reasons to accept review now. To the contrary, the Government has once again failed to demonstrate any circuit conflict on the issue of manifest disregard, has failed to demonstrate that the issue was not waived during the original Fifth Circuit appeal, and has failed to show why this factual issue warrants review by this Court.

Accordingly, this Court should once again deny review in this case.

### B. The Joint Venture Agreement and the Government's Takeover of Keimir

In February 1993, Bridas entered into a joint venture agreement ("JVA") with an entity designated by the Government ("the Turkmenian Party") for the purpose of exploiting Turkmenistan's substantial oil and gas resources. (Petition Appendix ("App.") 2a.) The joint venture, known as Keimir, was intended to last 25 years. Under the JVA, the Turkmenian Party was entitled to receive hydrocarbon production up to 1992 levels, and both parties were to share equally in any subsequent increase in production. The JVA also provided Bridas with an unlimited export license for hydrocarbons. (App. 3a.)

Only a year into the joint venture, in July 1994, the Government demanded a higher share of the production for itself. (Record on Appeal ("RA") 7261.) When the joint venture's board refused, the Government, through the Ministry of Oil & Gas ("MOG"), imposed a ban preventing the joint venture from exporting oil or gas. (RA 9327, 8612.) As a result, Bridas agreed to modify the JVA, increasing the Government's share of production and requiring the joint venture to contribute $10 million to special projects for the benefit of Turkmenistan. (RA 8078, 4470.) The Government then lifted the export ban on oil in March 1995. (RA 8071, cl. 1.) However, the joint venture was never permitted to export gas, nor was it paid for the gas it produced. (RA 8145, 4474.)

In June 1995, the Government demanded that the joint venture obtain new export permits, but refused to issue them. (RA 8142.) A representative from the MOG informed Bridas that exports could proceed only if it agreed to again renegotiate the JVA for Keimir and

another joint venture, Yashlar. (RA 8140.) By November 1995, the MOG was asserting that all previous agreements were unacceptable and again demanding an increased share in production, among other things. (RA 8139-38.) Altogether, the MOG's demands would have prevented Bridas from recouping its more than $200 million investment in Keimir. Bridas thus refused to renegotiate. (RA 8138-37.) The Government then promptly imposed a second export ban. (RA 8145, 8087.)

A few months later, the Government directed the MOG to seize control of the Keimir oil fields from the joint venture. (RA 7221, 7195, 7193.) The MOG ordered the Turkmenian Party to effect the takeover. (RA 7834, 7193.) In response, Bridas filed a complaint with the International Chamber of Commerce seeking specific performance of the JVA by the Government, the MOG, and the Turkmenian Party. (Request for Judicial Notice ("RJN") 0001.) Within days, the Turkmenian Party completed its takeover of Keimir on "instructions" of the Government. (RA 7190.) It seized the wells, the joint venture's other assets, and took control over personnel. (RA 8019-18.) It also confiscated workers' passports and demolished a security fence protecting the workers' living quarters. (RA 7182, 8134, 8018, 7184, 8133.)

Soon after the takeover was complete, the Government dissolved the then-existing Turkmenian Party and replaced it with Turkmenneft. (App. 3a.) Turkmenneft was capitalized with the equivalent of $17,000 U.S. dollars (App. 8a.) Its Chairman could be dismissed at the will of Turkmenistan's dictatorial President and was "personally responsible" to him. (RA 7926-25, ¶ 8.) The Government simultaneously decreed that all proceeds from oil and gas exports – including those generated by Turkmenneft –

were to be directed to a special State Oil and Gas Development Fund, whose assets were immune from seizure. (App. 3a-4a.) The new Turkmenian Party – Turkmenneft – was thus judgment-proof.

At the same time, the Government also abolished the MOG, replacing it with the Ministry of Oil & Gas Industry and Mineral Resources of Turkmenistan ("MOGI"). (RA 7961.) The Government declared that MOGI "shall not be liable for obligations of" multiple entities, including those of the "abolished [MOG]" and the Turkmenian Party. (RJN 0015, ¶ 9.) Nevertheless, MOGI was charged with many of the same responsibilities formerly belonging to the MOG. (RA 7931-28, ¶¶ 1, 3, 4, 5.)

### C. Proceedings Below

The arbitration took place in Houston, Texas, the place where the Government conducted bidding for Keimir and where Bridas accepted the JVA in principle. Turkmenneft and the Government were represented by the same attorneys at the arbitration. (RA 7434-31, 7406.) The tribunal concluded that the Government was a proper party to the arbitration and that the tribunal had jurisdiction to arbitrate the dispute. The tribunal held both Turkmenneft and the Government liable for repudiating the joint venture agreement with Bridas. It awarded $495 million in damages against both parties and in favor of Bridas. (App. 4a.)

Bridas sought confirmation of the award against the Government and Turkmenneft in the U.S. District Court in Houston. (App. 18a.) Turkmenneft filed a motion to vacate the award, asserting that the Government was not a proper party to the proceedings so it could not be bound

by the award, and alleging that the award was issued in manifest disregard of the law because the tribunal applied a purportedly erroneous discount rate to determine the present value of Bridas' future losses. *Bridas S.A.P.I.C. v. Government of Turkmenistan*, 345 F.3d 347, 353 (5th Cir. 2003) ("*Bridas I*").

The district court considered several theories for binding the Government to the award, including alter ego, agency, and estoppel. (App. 4a.) The district court initially upheld the award against the Government on theories of agency and estoppel. *Id.* It also determined that the discount rate selected by the tribunal was not in manifest disregard of the law, and affirmed the award. *Bridas I*, 345 F.3d at 353.

In its first decision in this case, the Fifth Circuit affirmed in part and reversed in part. The Fifth Circuit agreed that the arbitrators did not manifestly disregard the law in selecting an interest rate, and affirmed the award against Turkmenneft. *Bridas I*, 345 F.3d at 364-65. However, it held that the Government could not be bound to the award on theories of agency or estoppel, and remanded for further proceedings on the theory of alter ego. *Bridas I*, 345 F.3d at 356-62. On a second appeal, which is the case now before this Court, the Fifth Circuit held that the Government was bound to the agreement under an alter ego theory, holding that respecting the separate juridical status of the Government and Turkmenneft would result in injustice because "the Government misused Turkmenneft to harm Bridas by destroying the value of the JVA" *and* then "issued a number of decrees distancing itself from the joint venture and attempting to limit its potential exposure to liability." (App. 8a.)

## REASONS FOR DENYING THE WRIT

### I. THE FIFTH CIRCUIT'S DECISION DOES NOT CREATE A CONFLICT OVER THE PROPER SCOPE OF THE *BANCEC* "INJUSTICE" EXCEPTION.

*Bancec* teaches that the separate juridical status of a government and its instrumentality may be ignored under either of two conditions: control or injustice. *Bancec*, 462 U.S. at 629 ("where a corporate entity is so extensively controlled by its owner that a relationship of principal and agent is created, . . . one may be held liable for the actions of the other"); *id.* ("the doctrine of corporate entity . . . will not be regarded when to do so would work fraud or injustice"). In *Bancec*, this Court ignored the separate juridical status of Banco Nacional and the Cuban government solely to avoid injustice. *Id.* at 634.

Other courts have recognized a host of other situations that are consistent with this teaching. *E.g., Thomson-CSF, S.A. v. American Arbitration Ass'n*, 64 F.3d 773, 778 (2d Cir. 1995) (recognizing five theories, including incorporation by reference, assumption, agency, veil-piercing/alter ego, and estoppel under which separate status should be ignored).

The Fifth Circuit rejected most of these theories in this case, but found Turkmenneft's separate juridical status should not be recognized because the Government was Turkmenneft's alter ego. (App. 14a.) This ruling was based on its conclusions that the Government both extensively controlled Turkmenneft *and* that such control resulted in a fraud or injustice. (App. 8a.) Thus, in binding the Government to the arbitration award against Turkmenneft, the

Fifth Circuit required more than *Bancec* required – it required control and injustice.

Nevertheless, the Government asserts that the Fifth Circuit's decision conflicts with *Bancec* and subsequent decisions, because "injustice" can be found only under *Bancec*'s unique facts – when there is a violation of international law and the party seeking to maintain its separate status attempts to obtain monetary relief in U.S. courts. (Pet. at 8-9.) However, the Government's view of when separate status should not be recognized is contradicted by the *Bancec* opinion itself: "Our decision today announces no mechanical formula for determining the circumstances under which the normally separate juridical status of a government instrumentality is to be disregarded." *Bancec*, 462 U.S. at 633.

Moreover, the cases following *Bancec*, upon which the Government relies, do not support the narrow view it asserts. For instance, in *Banco Nacional de Cuba v. Chemical Bank New York Trust Co.*, 782 F.2d 377 (2d Cir. 1986), the Second Circuit identified a number of key factors that animated *Bancec*'s analysis in addition to the violation of international law and use of U.S. courts by Cuba. These included (1) that a misuse of the instrumentality had occurred; (2) that the complaining party had been harmed by it; (3) that the party against which liability was sought to be imposed played a role in the misuse; (4) that the claim arose from the alleged misuse of the instrumentality; and (5) that the money sought to be recovered could be traced to the entity from which it was sought. *Id.* at 380. Finding none of these factors existed in the case before it, the Second Circuit refused to impose liability on Banco Nacional for the Republic of Cuba's nationalization of a third party's assets. *Id.* The Court did

not say that a violation of international law and the use of U.S. courts had to be found to establish alter ego liability.

Other decisions cited by the Government similarly look to a host of factors other than violation of international law and the use of U.S. courts to decide if separate corporate status should be upheld, including many considered by the Fifth Circuit in this case, namely, observation of corporate formalities, *Flatow v. Islamic Republic of Iran*, 308 F.3d 1065, 1073-74 (9th Cir. 2002) (concluding that corporate formalities were observed); *Zappia Middle East Constr. Co. Ltd. v. Emirate of Abu Dhabi*, 215 F.3d 247, 252 (2d Cir. 2000) (same), the adequacy of the instrumentality's capitalization, *Transamerica Leasing, Inc. v. La Republica de Venezuela*, 200 F.3d 843, 854 (D.C. Cir. 2000) (concluding that the instrumentality was adequately capitalized), and the government's control or supervision of the instrumentality, *Flatow*, 308 F.3d at 1073-74 (concluding that the government was not involved in the day-to-day supervision of the instrumentality); *Alejandre v. Telefonica Larga Distancia De Puerto Rico, Inc.*, 183 F.3d 1277, 1287 (11th Cir. 1999) (concluding that the government had not abused the corporate form of its instrumentality to perpetrate a wrong); *De Letelier v. Republic of Chile*, 748 F.2d 790 (2d Cir. 1984) (concluding that no abuse of the corporate form occurred). None of these cases adopts the narrow view the Government asserts, namely, that use of U.S. courts and a violation of international law are necessary to establish injustice under *Bancec*.

The Government also claims that several cases conflict with the result in the Fifth Circuit's opinion, but each of these cases is easily distinguishable. *Flatow*, 308 F.3d at 1073-74 (refusing to find alter ego when there was no evidence that the government acted through its

instrumentality to commit the alleged wrong); *Zappia*, 215 F.3d at 252 (same); *Transamerica Leasing*, 200 F.3d at 854 (refusing to treat the government and its instrumentality as one when there was no showing that the government misused the instrumentality); *Alejandre*, 183 F.3d at 1287 (finding that no injustice would result by recognizing the separate status of the instrumentality and the government when the instrumentality had no involvement in the underlying wrong).[1] Thus, these cases are each distinguishable from the situation here, where the Fifth Circuit found "ample evidence" of the Government's manipulation of Turkmenneft, which resulted in direct harm to Bridas. (App. 8a.)

The Government next asserts that the harm to Bridas did not merit piercing the veil because uncollectibility of a debt, by itself, is not legally sufficient to pierce the veil. (Pet. at 13-14.) This assertion both ignores the nature of Bridas' injuries and is unsupported by the cases the Government cites.

First, the Fifth Circuit did not pierce the veil simply because Bridas would otherwise have been unable to collect its debt from Turkmenneft. Rather, the Fifth Circuit's decision turned on the fact that the Government

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[1] Other cases cited by Turkmenistan are not on point. *Federal Ins. Co. v. Richard I. Rubin & Co., Inc.*, 12 F.3d 1270, 1290 n.16 (3d Cir. 1993) ("We need not, and do not, express any opinion as to whether the district court was correct in concluding that it would work a fraud or be unjust to adhere to the corporate separateness of ABP and USA Holding on this record."); *De Letelier*, 748 F.2d at 795 & n.2 (refusing to treat Chile and its instrumentality as one, in part, because the district court's evidentiary findings were based on the imposition of discovery sanctions against Chile and there was no "independent evidence that the actions of LAN and Chile are one and the same").

held Turkmenneft out as an independent entity capable of assuming complete responsibility for its obligations to the joint venture, but "manipulated Turkmenneft legally and economically to repudiate the contract with Bridas and then rendered it impossible for Bridas to collect damages." (App. 12a; *see also id.* 8a ("Turkmenistan's manipulation of Turkmenneft to prevent Bridas from recovering any substantial damage award satisfies the 'fraud or injustice' prong [of the *Bancec* analysis]."); *id.* 13a-14a ("[T]he Government . . . exercised its power as a parent entity to deprive Bridas of a contractual remedy."). The Government not only rendered Turkmenneft's assets immune from seizure, it also seriously undercapitalized it. (App. 8a.) Such intentional manipulation for the purpose of avoiding liability "is a classic ground for piercing the corporate veil." (App. 14a; *see also Anderson v. Abbott*, 321 U.S. 349, 362 (1944) ("An obvious inadequacy of capital, measured by the nature and magnitude of the corporate undertaking, has frequently been an important factor in cases denying stockholders their defense of limited liability. [Citations omitted]. That rule has been invoked even in absence of a legislative policy which undercapitalization would defeat.")).

The Government's claim of a conflict between the Fifth Circuit and other cases on uncollectibility is mistaken, because the uncollectibility in these other cases was a result of the governments' sovereign immunity, not their abuse of the corporate form. *Flatow*, 308 F.3d at 1065 (refusing to treat bank as one with the government when there was strong evidence of corporate separateness and Iran did not control or manage the bank); *Alejandre*, 183 F.3d at 1287 (refusing to permit garnishment of debts

owed to a phone company with no involvement in the underlying wrong).[2]

Accordingly, the Fifth Circuit's decision in *Bridas* does not conflict with either this Court's decision in *Bancec* or the decisions of the courts of appeal that follow it.

## II. THE FIFTH CIRCUIT PROPERLY DECIDED THAT THE GOVERNMENT WAS BOUND TO THE ARBITRATION AWARD UNDER ALTER EGO PRINCIPLES.

### A. The Fifth Circuit's Decision Is Consistent With the Consensual Basis of Arbitration.

The Government asserts that the Fifth Circuit was wrong to bind it to the arbitration award in favor of Bridas because it never consented to arbitration. It contends that alter ego is not a proper theory for binding a nonsignatory to an arbitration agreement, and that events that occur "years after" an agreement is executed should not bind a nonsignatory. The Government also asserts that no other court has bound a nonsignatory government to an international arbitration award in the absence of the government's consent. (Pet. at 15-18.) As to the first two arguments, the Government is simply wrong. As to the

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[2] The Government also asserts that uncollectibility must be proven before it can be invoked to bind it to the arbitration award, citing *Ministry of Defense of the Islamic Republic of Iran v. Gould, Inc.*, 969 F.2d 764 (9th Cir. 1992). However, Bridas offered ample evidence of uncollectibility, including that Turkmenneft's revenues are diverted to a state fund immune from seizure and that it is severely undercapitalized. (App. 8a.) In contrast, the court in *Gould* found no evidence that the debt was uncollectible, and there was no evidence of undercapitalization. *Gould* is thus readily distinguishable.

last, it demonstrates that review is unnecessary in this case.

Federal courts consistently recognize that a nonsignatory may be bound to an arbitration agreement under various legal theories, including alter ego, incorporation by reference, third party beneficiary, and agency. *Comer v. Micor, Inc.*, 436 F.3d 1098, 1101 (9th Cir. 2006); *Trippe Mfg. Co. v. Niles Audio Corp.*, 401 F.3d 529, 532 (3d Cir. 2005); *Javitch v. First Union Secs., Inc.*, 315 F.3d 619, 629 (6th Cir. 2003); *Bridas I*, 345 F.3d at 356; *Intergen N.V. v. Grina*, 344 F.3d 134, 144, 148-50 (1st Cir. 2003); *Employers Ins. of Wausau v. Bright Metal Specialties, Inc.*, 251 F.3d 1316, 1322 (11th Cir. 2001); *International Paper Co. v. Schwabedissen Maschinen & Anlagen GMBH*, 206 F.3d 411, 417 (4th Cir. 2000); *Thomson-CSF*, 64 F.3d at 778. These theories have been deemed tantamount to actual consent because under each of them, "the totality of the evidence supports an objective intention to agree to arbitrate." *Sarhank Group v. Oracle Corp.*, 404 F.3d 657, 662 (2d Cir. 2005).[3]

Alter ego is a doctrine of "reciprocal fairness," grounded in the idea that "[p]ersons who fail to maintain full corporate formalities cannot expect the state to grant them the limited liability that flows from the corporate form." *Pan Eastern Exploration Co. v. Hufo Oils*, 855 F.2d 1106, 1132-33 (5th Cir. 1988) ("[I]f the shareholders

[3] Turkmenistan asserts that *Sarhank* stands for the proposition that a nonsignatory must "demonstrate an 'objective' intent to arbitrate" before it can be bound to the agreement. (Pet. at 16.) This does not support Turkmenistan's position here because *Sarhank* recognized that such an intent could be implied in an alter ego case. *Sarhank*, 404 F.3d at 662.

themselves disregard the separation of the corporate enterprise, the law will also disregard it so far as necessary to protect individual and corporate creditors."), *superseded by statute on other grounds as stated in Fidelity & Deposit Co. of Maryland v. Commercial Cas. Consultants, Inc.*, 976 F.2d 272 (5th Cir. 1992).

There is no reason to treat government instrumentalities any differently. As this Court has recognized, "the instrumentality's assets and liabilities must be treated as distinct from those of its sovereign in order to facilitate credit transactions with third parties." *Bancec*, 462 U.S. at 625-26. But if acts of the government destroy such separateness – as the Government's acts did here – the law owes no more respect to the separate juridical status of the instrumentality than it does when only private entities are involved.

The Government's related contention that arbitration agreements are different than other contracts is wrong. As this Court has recognized, arbitration agreements belong on "the same footing as other contracts." *Scherk v. Alberto-Culver Co.*, 417 U.S. 506, 511 (1974) (requiring that an international arbitration agreement be enforced according to the provisions of the Federal Arbitration Act). Thus, the same theories that are used to bind nonsignatories to other contracts in exceptional circumstances – including the alter ego/*Bancec* injustice exception – apply equally to arbitration agreements.

The fact that these theories are used to bind a nonsignatory for acts that happen after the execution of the contract is of no moment, for that is the very nature of these theories. The Government cannot fairly complain when it is being held responsible for its bad acts after the

contract was signed. Otherwise, there would be no limit to how the corporate form could be abused after a contract was signed.

Finally, the Government complains that it should not be bound to an international arbitration agreement it did not sign because other courts have not bound government nonsignatories in other situations. However, the fact that such nonsignatories are so infrequently bound by agreements they did not sign undermines the Government's assertion that review is necessary here to purportedly solve a major problem. As the Fifth Circuit recognized, this is a "rare case." (App. 14a.) This Court's review would affect only one case – this case – so it is not warranted.

### B. Permitting the Fifth Circuit's Decision to Stand Will Actually Support Global Economic Development.

The Government argues that global commerce will suffer if it is bound to the arbitration award against Turkmenneft. (Pet. at 19-21.) The Government basically urges that international legal principles – particularly the alter ego doctrine – should not apply to it. In other words, the Government urges a rule under which the rule of law would not apply to it. However, any such rule would impede, not promote, global commerce.

If governments are permitted to hold one of their instrumentalities out as an independent partner in international commerce, they cannot be permitted to manipulate the instrumentality in ways that undermine that independence and defy the other contracting party's reasonable expectations as to how a contract would be performed. Allowing them to do so would undermine business

confidence and global economic development, because no one could count on agreements being enforced in accordance with the rule of law. Particularly in such egregious circumstances as in this case, a government, or any other corporate parent, must not be permitted to hide behind the separate juridical status of its instrumentality when it has used that instrumentality as a puppet to satisfy its own ends. Enforcing the alter ego doctrine will not impede global economic development, it will encourage such development by reaffirming that traditional legal doctrines will be applied in international arbitrations.

## III. THE FIFTH CIRCUIT DID NOT OVERSTEP ITS ROLE AS A REVIEWING COURT.

The Government asks this Court to accept review because the Fifth Circuit purportedly "overstepped its role as a reviewing court" under Federal Rule of Civil Procedure 52 by "engag[ing] in *de novo* factfinding." (Pet. at 23.) This argument misses the mark because the Fifth Circuit did not disturb any of the district court's findings in concluding that the Government was Turkmenneft's alter ego.

Rule 52 provides that a district court's findings of fact "shall not be set aside unless clearly erroneous." Fed. R. Civ. Proc. 52. The rationale for this rule is largely grounded in a concern that *de novo* factfinding at the appellate level is a burden on the resources of the courts and the parties when it duplicates work the trial court has already done. *Anderson v. City of Bessemer City, North Carolina*, 470 U.S. 564, 574-75 (1985).

The Government attacks only a single conclusion made by the Fifth Circuit – that Turkmenneft was unable

to satisfy the award against it. As the Government concedes, the district court did not resolve this issue. (Pet. at 22.) However, the district court did conclude as a matter of law that "Turkmenneft was not financially independent from its parent." (Dist. Ct. Op. at 24.) The Fifth Circuit's conclusion did not disturb this conclusion, but rather affirmed it. (App. 8a (agreeing with the district court's assessment on financial separateness and noting evidence that the Government undercapitalized Turkmenneft and rendered its revenues immune from seizure by "[i]ntentionally bleeding [its] subsidiary to thwart creditors").)[4]

Even assuming for the sake of argument that the Fifth Circuit's conclusion was a finding of fact, appellate courts, including this Court, have long recognized their power to make factual findings when there is a sufficient record so long as they do not contradict the district court's findings. *Sampson v. Murray*, 415 U.S. 61, 86 n.58 (1974) (holding that district court's failure to make factual findings does not foreclose appellate review because the reviewing court can examine the record); *In re Holloway*,

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[4] The Government attacks the Fifth Circuit's conclusion that Turkmenneft was unable to satisfy the award in favor of Bridas, contending that it lacked support in the record and "disregarded the unrebutted evidence of Turkmenneft's substantial assets." (Pet. at 24.) That is not so. As the Fifth Circuit concluded,

> [t]he fact that Turkmenneft owned producing rights and equipment that it contributed to the joint venture does not in this case support a claim of financial separateness, because such resources could only carry value if the venture were allowed to keep its own revenues, which it was not. Further, the Government changed the law to prevent Turkmenneft's assets from being seized by a creditor such as Bridas, after the initiation of arbitration proceedings.

(App. 13a.)

955 F.2d 1008, 1015 (5th Cir. 1992) (holding that remand for further findings would have been "a hollow ritual" when the record was sufficiently clear to allow the appellate court to make the necessary findings to reach decision); *Magna Weld Sales Co., Inc. v. Magna Alloys and Research Pty. Ltd.*, 545 F.2d 668, 671 (9th Cir. 1976) (refusing to remand for findings because "a full understanding of the question presented may be had without the aid of separate findings").

Here, the Fifth Circuit had before it a voluminous documentary record. It was therefore proper for the Fifth Circuit to review the record and reach its decision without remanding for additional findings.

None of the cases cited by the Government requires the Fifth Circuit to limit itself to the factual findings of the district court in reviewing Turkmenneft's motion to vacate. *Anderson*, 470 U.S. at 564 (correcting an appellate court's incorrect application of the clear error standard); *Zenith Radio Corp. v. Hazeltine Research, Inc.*, 395 U.S. 100 (1969) (same); *United States v. Dennison*, 410 F.3d 1203, 1210 (10th Cir. 2005) (applying Federal Rule of Criminal Procedure 12(d), not Rule 52); *Transmatic, Inc. v. Gulton Indus., Inc.*, 53 F.3d 1270 (Fed. Cir. 1995) (remanding action for a determination of damages when the district court failed to make necessary findings required by Rule 52 when the court employs an advisory jury); *United States ex rel. Honeywell, Inc. v. A & L Mechanical Contractors, Inc.*, 677 F.2d 383, 386-87 (4th Cir. 1982) (refusing to find facts to resolve issue not raised in district court).

Because the Fifth Circuit did not disturb any of the district court's findings, its decision was not in conflict with the cases the Government cites.

## IV. THE GOVERNMENT HAS NOT PRESENTED A CERTWORTHY QUESTION ON THE ISSUE OF MANIFEST DISREGARD.

In January 2004, after the first Fifth Circuit decision, the Government and Turkmenneft filed a petition for certiorari (No. 03-1018), which asked whether the Fifth Circuit applied the correct standard for manifest disregard of the law when it affirmed the arbitrators' decision about the discount rate that should be used to calculate the damage award. On March 22, 2004, this Court denied that petition.

The present petition raises exactly the same issue. Because the Government has offered no new, sound reason for granting certiorari, its petition should again be denied.[5]

### A. There Is No Material Conflict Among the Circuits Over the Meaning of Manifest Disregard.

The Government again contends that there is a split among the Circuits as to the manifest disregard required to vacate an arbitration award. As Bridas demonstrated in its previous opposition, there is no material Circuit split. (Bridas' Opp'n to Pet. at 13.)

The petition for *certiorari* now cited by the Government demonstrates once again that no split exists.[6] Petition for

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[5] Renewed applications are disfavored. Supreme Court Rule 22.4 ("Except when the denial is without prejudice, a renewed application is not favored.").

[6] The Government claims that John Hancock's petition shows the purported conflict "has only deepened" since its first petition in 2004. (Government's Pet. at 25.) However, in the underlying decision, the

(Continued on following page)

Writ of *Certiorari*, John Hancock Life Ins. Co. v. Patten, No. 06-49, at 12-13 (Jul. 10, 2006).

### B. Review Is Inappropriate for Several Other Reasons.

Bridas presented further reasons for denying review of this issue in its opposition to the prior petition, including that the Government had waived the issue below, that the issue was not justiciable, and that, in the absence of any controlling legal authority on the issue of the discount rate, the issue was a factual one unsuited for review by this Court. The Government has yet to persuasively respond to any of these arguments.

First, the Government waived any argument that the Fifth Circuit's manifest disregard standard was improper during the first appeal. (Bridas' Opp'n to Pet. at 10.) During that appeal to the Fifth Circuit, the Government objected to Bridas citing to the other Circuits' application of the manifest disregard standard, and insisted that only the Fifth Circuit's version was applicable. (Government's

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Fourth Circuit reiterated the traditional manifest disregard test. *Patten v. Signator Ins. Agency, Inc.*, 441 F.3d 230, 235 (4th Cir. 2006).

The Government asks this Court to delay its consideration of the current petition until after its decision in *Patten*. Certiorari has not been granted in *Patten*. Even if certiorari were granted, it would not help the Government. Unlike the Government, John Hancock wants this Court to abolish the manifest disregard standard. Petition for Writ of Certiorari, *supra*, at 3. If John Hancock prevails, the Government's petition on this issue will be moot because there will be no manifest disregard standard at all. Even if John Hancock does not prevail, the case does not present an opportunity for this Court to adopt a new definition of manifest disregard. *Patten*'s outcome cannot help the Government.

Reply Br. at 6-7.) When it lost in the Fifth Circuit, the Government then reversed course and argued in this Court that it was not required to raise the issue of a circuit split before the Fifth Circuit, even though it made no mention of its concession in the Fifth Circuit that the Fifth Circuit standard was proper in this case. (Government's Reply Pet. at 1.) Accordingly, the Government cannot now complain that the Fifth Circuit standard is legally erroneous. *TRW Inc. v. Andrews*, 534 U.S. 19, 34 (2001) (declining to reach an issue that "was not raised or briefed below").

Second, the Government's argument is not justiciable because the Government cannot prevail under any Circuit's definition of manifest disregard. (Bridas' Opp'n to Pet. at 22-23.) As the Fifth Circuit recognized, the Government identified no controlling law that the arbitral panel could have disregarded in applying the discount rate. *Bridas I*, 345 F.3d at 365. Thus, the Government's petition fails to satisfy Article III's requirement that federal courts adjudicate only actual "cases" and "controversies," because no matter what the test is for manifest disregard, it cannot aid the Government.

At bottom, the issue for which the Government seeks review is a factual issue of what discount rate should have been applied to the damages award – an issue that was ultimately decided on conflicting expert testimony. (RE5:4706; RE9:5231-33.) This Court does not grant *certiorari* to review factual decisions by arbitrators. *Major League Baseball Players Ass'n v. Garvey*, 532 U.S. 504, 509-11 (2001) ("Courts are not authorized to review the arbitrator's decision on the merits despite allegations that the decision rests on factual errors or misinterprets the parties' agreement. . . ."); Supreme Court Rule 10 ("[A] petition for a writ

of *certiorari* is rarely granted when the asserted error consists of erroneous factual findings. . . .").

### C. In Any Event, The Government Has Not Properly Presented the Question for This Court's Review.

If the Government wanted to present the manifest disregard issue for this Court's serious consideration, it had to set out its contentions in the body of its petition,[7] rather than merely referring to a petition denied two years ago and a pending petition by another party that is not even on point.

## CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Dated: October 11, 2006

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[7] Supreme Court Rule 14.2 ("All contentions in support of a petition for a writ of *certiorari* shall be set out in the body of the petition. . . .").